

to differences in rate structure, but the resulting switching, transport, and port costs for CLECs are virtually identical to those same costs for New York, which the FCC already found to be reasonable and in compliance with TELRIC in the Bell Atlantic New York Order. The filing and approval of this tariff should put to rest any arguments that UNE rates in Massachusetts are not TELRIC-compliant.

For all of the reasons discussed above, the FCC should conclude that VZ-MA's rates for UNEs are in compliance with the requirements of the Act. The Department has long recognized that prices based on incremental cost are most consistent with a market environment (see earlier discussion of D.P.U. 1731), and the Department was an early proponent of using forward-looking cost methods for calculating UNE prices (see Massachusetts comments in FCC Docket No. 96-98, filed in May, 1996). The Department has consistently and faithfully applied the FCC's TELRIC methodology since its inception, and the FCC should affirm that UNE rates in Massachusetts are consistent with its TELRIC methodology.

C. Checklist Item 3 - Poles, Ducts, Conduits, and Rights-of-Way

1. Standard of Review

Under § 271(c)(2)(B)(iii), BOCs are required to provide "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and

reasonable rates in accordance with the requirements of section 224.”⁶⁷² Section 224 permits a utility to deny access to its poles, etc., on a nondiscriminatory basis, “where there is insufficient capacity and for the reasons of safety, reliability and generally applicable engineering purposes.” Section 224 further addresses the maximum rates a utility may charge for pole attachments.⁶⁷³

a. Background of Relevant Department Precedent

In 1984, the Department adopted regulations pursuant to Massachusetts G.L. c. 166, § 25A, giving the Department the authority to regulate the rates, terms, and conditions of utility (including telephone companies) pole attachments and conduits, and to address complaints by licensees.⁶⁷⁴ Since 1984, the Department has addressed only one complaint concerning VZ-MA pursuant to those regulations. In 1992, the Department resolved a complaint over conduit license fees by adopting a new methodology by which VZ-MA was required to calculate annually conduit license fees.⁶⁷⁵

On July 24, 2000, the Department adopted regulations governing access to pole attachments, ducts, conduits, and rights-of-way pursuant to G.L. c. 166, § 25A, and 220

⁶⁷² 47 U.S.C. § 271(c)(2)(B)(iii).

⁶⁷³ 47 U.S.C. § 224.

⁶⁷⁴ Appdx. B (CATV Rulemaking Order, D.P.U. 930 (1984)); 220 C.M.R. §§ 45.00 et seq.

⁶⁷⁵ Appdx. C (Complaint of Greater Media, Inc., D.P.U. 91-218 (1992)).

C.M.R. §§ 45.00 et seq.⁶⁷⁶ These revised regulations include procedures designed to ensure that access to poles, ducts, conduits and rights-of-way is provided on a nondiscriminatory basis. Before the completion of this rulemaking, Massachusetts had not yet taken the requisite steps to exercise full jurisdiction over discriminatory access claims, although the Department has for some time regulated rates, terms and conditions for pole attachments, ducts, conduits and rights-of-way. Accordingly, the Department opened the rulemaking to benefit competition by requiring entities subject to G.L. c. 166 § 25A to provide nondiscriminatory access to any pole, duct, conduit, or right-of-way under their ownership or control, and by establishing regulations for discriminatory access complaints.

2. Discussion

a. Background

VZ-MA uses standard pole attachment and conduit license agreements to provide access to its poles, ducts, conduits, and rights-of-way.⁶⁷⁷ The same standard license agreements are used by VZ-MA for all of its New England states and VZ-MA also employs a centralized License Agreement Group (“LAG”) to handle requests for access to its poles, ducts, conduits,

⁶⁷⁶ See VZ-MA Application, Appdx. C, Vol. 1, Tab 32 (D.T.E. Final Order Promulgating Final Regulations) (July 24, 2000).

⁶⁷⁷ VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 37 (VZ-MA May Supplemental Comments).

and rights-of-way.⁶⁷⁸ VZ-MA states that it has amended its standard license agreements to conform with the Act and has not enforced terms and conditions contained in its existing license agreements that may conflict with the Act.⁶⁷⁹

As of the second quarter of 2000, VZ-MA had 362 pole attachment agreements and 86 conduit occupancy agreements in place.⁶⁸⁰ To date, VZ-MA has not received any requests for access to private rights-of-way.⁶⁸¹ During the second quarter of 2000, VZ-MA licensed over 5,000 pole attachments, which is 60 percent more poles than it licensed during the second quarter of 1999.⁶⁸² Additionally, during the first half of 2000, VZ-MA licensed over 170,000 feet of conduit, which is nearly three times as many feet of conduit as it licensed during the first half of 1999.⁶⁸³

According to VZ-MA, once an application for a pole attachment, or access to ducts or conduits is received, VZ-MA assigns a License Administration Coordinator ("LAC") who is responsible for coordinating all aspects of the application process including providing access to

⁶⁷⁸ Id. at 38.

⁶⁷⁹ Id. at 39.

⁶⁸⁰ VZ-MA Application, Appdx. B, Vol. 42, Tab 494 ¶ 63 (VZ-MA August Supplemental Checklist Aff.).

⁶⁸¹ Id.

⁶⁸² VZ-MA Application, Appdx. A, Tab 1 ¶ 198 (Lacouture/Ruesterholz Decl.).

⁶⁸³ Id. at ¶ 199.

maps, records, and other information; assigning available space; and coordinating any necessary field surveys.⁶⁸⁴ VZ-MA states that applications are processed on a first come, first-served basis.⁶⁸⁵ VZ-MA states that it evaluates requests for access based on widely-accepted standards regarding capacity, safety, reliability, and general engineering.⁶⁸⁶ VZ-MA states that its procedures require completion of make-ready work and issuance of licenses for pole attachments within 180 days and conduit occupancy within 90 days after receiving authorization from the licensee.⁶⁸⁷

VZ-MA states that it completed the make-ready work for pole attachment requests in the first quarter of 1999 in an average of 132 days for licensees, compared with an average of 171 days for similar work for itself.⁶⁸⁸ During the same period, VZ-MA states it completed the make-ready work for conduit occupancy requests on average within 94 days of receipt of

⁶⁸⁴ Id. at ¶ 190.

⁶⁸⁵ VZ-MA Application, Appdx. B, Vol. 12, Tab 160 at 45 (Transcript of Technical Session Held 11/1/99).

⁶⁸⁶ VZ-MA Application, Appdx. B, Vol. 12, Tab 161 at 239-240 (Transcript of Technical Session Held 11/2/99).

⁶⁸⁷ VZ-MA Application, Appdx. B, Vol. 42, Tab 494 ¶ 64 (VZ-MA August Supplemental Checklist Aff.).

⁶⁸⁸ VZ-MA Application, Appdx. B, Vol. 12, Tab 160 at 150 (Transcript of Technical Session Held 11/1/99).

payment from the licensee of the make-ready estimate, compared with 216 days for itself.⁶⁸⁹ In May through July 2000, VZ -MA completed the make-ready operations for pole attachments within 80 days for CLECs and Cable Antenna Television (“CATV”) companies, compared with 151 days for make-ready work for itself.⁶⁹⁰ Moreover, in May through July 2000, VZ-MA completed the make-ready work for conduit occupancy within 35 days for CLEC and CATV companies, compared with 75 days for make-ready work for itself.⁶⁹¹

During the first quarter of 2000, VZ-MA competed make-ready work and issued licenses for pole attachments in an average of 130 days (166 days for CLECs and other common carriers (“OCCs”)), 144 days for cable companies, and 38 days for OCCs.⁶⁹² The average number of days for make-ready work for conduit occupancy for the first quarter of 2000 was 90 days.⁶⁹³ During the second quarter of 2000, VZ-MA received 30 requests for access to records and was able to provide the information requested for more than 80 percent of those requests within five business days after receipt of the request.⁶⁹⁴ According to VZ-

⁶⁸⁹ Id. at 129.

⁶⁹⁰ VZ-MA Application, Appdx. A, Tab 1 ¶ 201 (Lacouture/Ruesterholz Decl.).

⁶⁹¹ Id.

⁶⁹² VZ-MA Application, Appdx. B, Vol. 42, Tab 494 ¶ 64 (VZ-MA Supplemental Affidavits).

⁶⁹³ Id.

⁶⁹⁴ Id. at ¶ 65.

MA, it responded to these requests “on an average of approximately four business days.”⁶⁹⁵

VZ-MA states that it has added additional personnel to its LAG and has made managerial changes in its LAG staff to respond to requests by licensees more effectively and efficiently.⁶⁹⁶

Additionally, at least 90 percent of the time during the second quarter of 2000, VZ-MA states that it was able to satisfy CLEC requests for access to poles without make-ready work.⁶⁹⁷

According to VZ-MA, in those instances, CLECs gained access to a pole, conduit and duct immediately upon the issuance of a license.⁶⁹⁸

Beginning in April 1999, VZ-MA conducted a series of licensee workshops with approximately 20 licensees participating, including CLECs from throughout New England.⁶⁹⁹

The purpose of these workshops was to improve communications between VZ-MA and CLECs, to provide training and information on VZ-MA’s licensing procedures, and to obtain licensee input for updates to the terms and conditions of the licensing agreements.⁷⁰⁰ As a result of the workshops, VZ-MA made several important modifications to its licensing

⁶⁹⁵ Id.

⁶⁹⁶ VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 38 (VZ-MA May Supplemental Comments).

⁶⁹⁷ VZ-MA Application, Appdx. A, Tab 1 ¶ 194 (Lacouture/Ruesterholz Decl.).

⁶⁹⁸ Id.

⁶⁹⁹ Id. at ¶ 191.

⁷⁰⁰ Id.

procedures. For example, under VZ-MA's revised conduit occupancy procedures, licensees now have three project management options for conduit access: (1) if a licensee has identified a conduit route, and no conduit and manhole breakout is available, then VZ-MA will not explore alternatives; (2) a licensee may request that VZ-MA assist in its exploration of conduit route alternatives if the CLEC's chosen route is not available; and (3) a licensee may ask for VZ-MA's assistance in developing available routes of access.⁷⁰¹ VZ-MA contends that all of its standardized license procedures are designed to ensure that competitors seeking access are treated consistently and in an equitable manner.

In summary, VZ-MA argues that it provides nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates in accordance with the requirements of § 224.⁷⁰² VZ-MA maintains that it treats all licensees in a similar manner because it uses standard license agreements for several New England states and because it maintains a centralized LAG that ensures consistent and efficient service to all licensees.⁷⁰³ VZ-MA contends that none of the issues raised by the CLECs rises to the level of § 271 non-compliance.

⁷⁰¹ Id.

⁷⁰² VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 38 (VZ-MA May Supplemental Comments).

⁷⁰³ Id.

b. Access to Poles

CLECs challenge a number of VZ-MA's policies concerning make-ready work for pole attachments.⁷⁰⁴ NECTA argues that VZ-MA should complete make-ready work within 60 days as opposed to the present 180-day interval.⁷⁰⁵ In addition, RCN and NECTA contend that licensees should be allowed to use their own workforce for make-ready work and that VZ-MA's prohibition against CLECs using their own workers violates FCC guidelines.⁷⁰⁶ RCN contends that VZ-MA unreasonably prevents CLECs from mitigating excessive and unnecessary make-ready work by not allowing CLECs to "box" poles,⁷⁰⁷ use extension brackets, or make temporary attachments to poles.⁷⁰⁸ RCN alleges that these methods of aerial construction have

⁷⁰⁴ VZ-MA Application, Appdx. B, Vol. 38, Tab 461 at 8 (NECTA Initial Comments); VZ-MA Application, Appdx. B, Vol. 38, Tab 460 at 54 (AT&T July Supplemental Comments); VZ-MA Application, Appdx. B, Vol. 38, Tab 459 at 8 (RCN July Supplemental Comments).

⁷⁰⁵ VZ-MA Application, Appdx. B, Vol. 49, Tab 565 at 5535 (Transcript of Oral Argument Held 9/8/00).

⁷⁰⁶ Id. at 5539, 5567.

⁷⁰⁷ "Box" or "boxing" refers to the practice of arranging wires on opposite sides of a pole. If boxing were acceptable, it would avoid, in many cases, the need to devise vertical space between wires and, therefore, eliminate portions of make-ready work. VZ-MA Application, Appdx. B, Vol. 42, Tab 494 ¶ 70 (VZ-MA August Supplemental Checklist Affidavit).

⁷⁰⁸ VZ-MA Application, Appdx. B, Vol. 49, Tab 565 at 5564 (Transcript of Oral Argument Held 9/8/00).

wide-spread use by cable companies and CLECs as well as VZ-MA.⁷⁰⁹ For example, RCN states that it applied for 137 pole attachments on Hancock Street in Quincy, Massachusetts in 1999, and a survey revealed “a heavily loaded pole line with electric, fire alarm, CATV and several CLEC fiber optic attachments, in addition to telephone attachments in certain sections.”⁷¹⁰ The survey also revealed that almost all the poles were “boxed” by another CLEC. RCN states that it asked VZ-MA to allow it to box the poles but was denied. RCN contends that VZ-MA has allowed “boxing” of 20 percent of VZ-MA’s poles in Quincy but that it will not allow RCN to box any poles.⁷¹¹

In response to criticisms of its make-ready work policies, VZ-MA states that it must comply with its collective-bargaining agreements, which permit only VZ-MA employees to perform work on its own facilities.⁷¹² According to VZ-MA, it may only use outside contractors for this type of work if: (1) emergency conditions exist; (2) VZ-MA does not own the equipment necessary to do the work; or (3) during limited periods of unusual load conditions, VZ-MA’s ability to meet its service commitments is in jeopardy, and the existing workforce cannot meet these needs even after the use of overtime and available temporary

⁷⁰⁹ Id.

⁷¹⁰ Id.

⁷¹¹ Id.

⁷¹² VZ-MA Application, Appdx. B, Vol. 42, Tab 494 ¶ 67 (VZ-MA August Supplemental Checklist Aff.).

transfers.⁷¹³ In addition, VZ-MA states that there are no restrictions in its union contract that prevent CLEC employees from working on CLEC-owned or controlled facilities.⁷¹⁴ VZ-MA also states that its estimates for make-ready work are sufficiently detailed for AT&T to evaluate their accuracy.⁷¹⁵

RCN also raises the issue of VZ-MA's policy of limiting pole applications to 2,000 poles in any one area, or district, as an unnecessary restriction on RCN's ability to expand its network in Quincy.⁷¹⁶ According to RCN, this policy effectively limits RCN to 6,000 poles at a time in Quincy, where there are three districts. RCN states that it needs to attach to approximately 9,500 poles in Quincy to fulfill its franchise obligations and that, so far, it has only been granted access to about one-third of that number.⁷¹⁷ RCN contends that it will need to attach to 60,000 VZ-MA poles this year, and that because of VZ-MA's limit on the number of poles that can be ordered at one time, RCN will have no chance to complete its business

⁷¹³ VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 45 (VZ-MA May Supplemental Comments).

⁷¹⁴ Id.

⁷¹⁵ Id.

⁷¹⁶ VZ-MA Application, Appdx. B, Vol. 38, Tab 459 at 1 (RCN July Supplemental Comments).

⁷¹⁷ VZ-MA Application, Appdx. B, Vol. 49, Tab 565 at 5564 (Transcript of Oral Argument Held 9/8/00).

plans pursuant to its franchise obligations with the City of Quincy.⁷¹⁸

With respect to VZ-MA's policy limiting the number of poles that can be ordered at one time, VZ-MA contends that the limitation is reasonable because the policy is intended to prevent a single CLEC from using most or all of VZ-MA's carrying plant to the detriment of other CLECs.⁷¹⁹ Moreover, VZ-MA states that its revised pole attachment agreement no longer contains an absolute prohibition on ordering more than 2,000 poles but rather "provides additional flexibility for VZ-MA to work together with a particular CLEC to reach an acceptable accommodation based on the unique facts and circumstances, and in consideration of VZ-MA's other requirements for itself and other licensees."⁷²⁰

VZ-MA responds to RCN's issue involving Quincy, by stating that VZ-MA's policy is not discriminatory because it is a standardized policy that applies to all CLECs, and because VZ-MA has not enforced the 2,000-pole restriction with respect to RCN.⁷²¹ VZ-MA explains that between June 14, 1999 and October 1, 1999, RCN submitted a total of 80 applications and that 44 have been licensed, nine are awaiting a check for make-ready work from RCN, and that

⁷¹⁸ Id. at 5567.

⁷¹⁹ VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 47 (VZ-MA May Supplemental Comments).

⁷²⁰ Id.

⁷²¹ VZ-MA Application, Appdx. B, Vol. 42, Tab 494 ¶ 68 (VZ-MA August Supplemental Checklist Aff.).

the remaining two are “in progress.”⁷²² Since the start of RCN’s build-out in Quincy, VZ-MA states that it has licensed more than one-third of the poles in Quincy and continues to process RCN’s requests for pole attachments in the city of Quincy.⁷²³

VZ-MA defends its policy against “boxing” of poles, stating that while “some instances of boxing of poles occurred in Quincy, those instances were not in conformance with VZ-MA’s practices, and we are not ‘boxing’ poles at new locations for VZ-MA’s facilities.”⁷²⁴ In addition, VZ-MA states that the Mayor of Quincy directed that no further boxing of poles be allowed.⁷²⁵

Finally, NECTA alleges that VZ-MA imposes unnecessary overlashing restrictions.⁷²⁶ According to NECTA, overlashing “only became controversial when [VZ-MA] became concerned that the fiber optic cables that cable operators were overlashing could be used for services that [VZ-MA] was providing, or might want to provide in the future.”⁷²⁷ Regarding

⁷²² Id. at ¶ 69.

⁷²³ Id.

⁷²⁴ Id. at ¶ 70.

⁷²⁵ VZ-MA Application, Appdx. B, Vol. 45, Tab 513 at 4145 (Transcript of Technical Session Held 08/14/99).

⁷²⁶ VZ-MA Application, Appdx. B, Vol. 49, Tab 565 at 5537 (Transcript of Oral Argument Held 09/08/00).

⁷²⁷ VZ-MA Application, Appdx. B, Vol. 38, Tab 461 at 14 (NECTA July Supplemental Comments).

VZ-MA's overlashing policy, VZ-MA states that it allows overlashing as long as it is performed in accordance with accepted engineering and safety standards and in a manner that does not adversely affect existing attachers' facilities, including VZ-MA's.⁷²⁸ In response to CLEC concerns, in August, 2000, VZ-MA changed its post-construction inspection policy so that VZ-MA may now inspect overlash projects when deemed appropriate and will not charge the licensee for the cost of inspecting poles when they are found to be in compliance.⁷²⁹

c. Access to Conduits

CLECs contend that VZ-MA fails to provide nondiscriminatory access to conduits.⁷³⁰ AT&T and Conversent object to VZ-MA's policy of reserving space in its conduits for VZ-MA's future needs, which, the CLECs argue, prevents the CLECs from meeting their current needs.⁷³¹

AT&T also contends that VZ-MA takes too long to process conduit applications. AT&T asserts that VZ-MA fails to meet the 45-day period for processing applications. Specifically, AT&T claims that VZ-MA's so-called "Procedure 9" violates FCC rules because it allows VZ-

⁷²⁸ VZ-MA Application, Appdx. B, Vol. 42, Tab 494 at ¶ 72 (VZ-MA August Supplemental Checklist Aff.).

⁷²⁹ VZ-MA Application, Appdx. B, Vol. 46, Tab 544 (VZ-MA's Response to DTE Record Request 318).

⁷³⁰ VZ-MA Application, Appdx. B, Vol. 49, Tab 565 at 5533 (Transcript of Oral Argument Held 09/08/00).

⁷³¹ Id.

MA seven days from receipt of an application to send the applicant a written statement for the estimated costs to perform the "Conduit Record Search and Manhole Survey."⁷³² This, according to AT&T, lengthens VZ-MA's processing interval from the stated 45-day interval to 52 days.⁷³³ Even given the lengthened interval, AT&T asserts that VZ-MA frequently misses the 52-day period.⁷³⁴

AT&T also contends that VZ-MA's conduit policy is discriminatory. According to AT&T, VZ-MA will not lease a full duct to CLECs if it believes that the CLEC will not need all of the duct at that time, but requires the CLEC to pay the cost of full duct.⁷³⁵

In addition, AT&T and Conversent contend that VZ-MA unnecessarily inflates the cost of make-ready work for CLECs by preventing CLECs from using their own workforce or vendors.⁷³⁶ Conversent also complains about the lack of intervals for the processing and provisioning of make-ready work by VZ-MA, leading to considerable delays in obtaining access to conduits.⁷³⁷ AT&T also contends that VZ-MA does not adequately itemize or explain make-

⁷³² VZ-MA Application, Appdx. B, Vol. 20, Tab 227 at 2528 (Transcript of Technical Session Held 12/02/99).

⁷³³ Id.

⁷³⁴ Id.

⁷³⁵ Id. at 2529-2530.

⁷³⁶ Id. at 2530, 2538.

⁷³⁷ Id. at 2538.

ready work estimates.⁷³⁸ Finally, AT&T and Conversent contend that VZ-MA does not allow them reasonable access to review plats because VZ-MA claims they are proprietary.⁷³⁹

Concerning its conduit access policies, VZ-MA states that AT&T's interpretation of the 45-day requirement is unreasonable. According to VZ-MA, "it is appropriate that all application-related intervals, including this one, be measured from the date all necessary paperwork and applicable fees are received to the date all work is complete."⁷⁴⁰ VZ-MA also contends that its performance measurements indicate that it does comply with the stated intervals for conduit application processing.⁷⁴¹

VZ-MA states that it provides CLECs with conduit plats, subject to redaction of proprietary and competitively sensitive information and execution of a non-disclosure agreement.⁷⁴² VZ-MA also states that this practice is the same as the one followed by VZ-NY.⁷⁴³ In addition, VZ-MA argues that its policy with regard to duct size is reasonable. VZ-MA explains that the policy is designed to make sure that a CLEC obtains only as much space

⁷³⁸ Id. at 2655-2658

⁷³⁹ Id. at 2560-2561, 2730-2737.

⁷⁴⁰ VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 42, n.23 (VZ-MA May Supplemental Comments).

⁷⁴¹ Id.

⁷⁴² Id. at 48.

⁷⁴³ Id.

in a conduit as is needed.⁷⁴⁴ In addition, VZ-MA disagrees with the CLECs' claim that it charges CLECs for a full conduit even though a CLEC is permitted to use only part of it. VZ-MA states that it applies make-ready work charges only once and space charges are set proportionately.⁷⁴⁵

3. Conclusions

In response to certain licensees' concerns and suggestions about the terms and conditions of VZ-MA's pole attachment and conduit license agreements, VZ-MA conducted several workshops with licensees to obtain CLEC's comments in order to revise these agreements.⁷⁴⁶ VZ-MA has since updated its pole attachment and conduit license agreements, incorporating many of the changes suggested by licensees.⁷⁴⁷ For example, VZ-MA has included in its revised pole attachment and conduit licensing agreements such changes as: (1) including a 45-day requirement to complete field surveys; (2) including a commitment that VZ-MA will strive to complete make-ready work within 90 days for conduit access and 180 days for pole attachments; (3) modifying the language concerning the limit on the number of pole applications to preserve VZ-MA's right to limit, if necessary, (rather than strictly prohibit) the filing for pole attachments to no more than 2,000 poles on all pending applications by each CLEC; (4)

⁷⁴⁴ Id. at 45.

⁷⁴⁵ Id. at 46.

⁷⁴⁶ Id. at 39.

⁷⁴⁷ Id.

providing CLECs with the ability to access VZ-MA's pole and conduit records; and (5) eliminating provisions that obligated a CLEC to bear the costs for make-ready work done for VZ-MA's own requirements.⁷⁴⁸

The Department has reviewed VZ-MA's revised license agreements and finds that the terms and conditions contained in both agreements are reasonable, nondiscriminatory and comply with the requirements set forth in the Act. In addition to the respective license agreements, the Department notes that VZ-MA administers access requests through a LAC who is responsible for coordinating all aspects of the application from providing access to maps, records, and other information, assigning available space, and coordinating any necessary field surveys. The record indicates that license applications are processed on a first come, first served basis.⁷⁴⁹ In light of the revised pole attachment and conduit occupancy agreements and the clear procedures that VZ-MA has in place (and for the reasons discussed below concerning specific CLEC criticisms), the Department is satisfied that VZ-MA provides nondiscriminatory access to poles, ducts, conduits, and rights-of-way at just and reasonable rates.

As noted above, during the technical sessions of this proceeding, AT&T, Conversent, NECTA, and RCN raised concerns in the following areas, which, they argue, demonstrate VZ-MA's non-compliance with its requirements under the Act: (1) VZ-MA's make-ready procedures; (2) VZ-MA's conduit access procedures; (3) VZ-MA's "boxing" procedures; and

⁷⁴⁸ Id. at 40.

⁷⁴⁹ VZ-MA Application, Appdx. A, Tab 1 ¶ 200 (Lacouture/Ruesterholz Decl.).

(4) VZ-MA's "overlapping" procedures. Specifically, NECTA requests that the Department adopt a make-ready provision whereby make-ready work must be completed within a 60-day period (as opposed to 180 days). Several CLECs argue that licensees should be able to use their choice of workforce to complete make-ready work.⁷⁵⁰ Additionally, NECTA⁷⁵¹ and RCN⁷⁵² allege that VZ-MA's requirement for CLECs to use VZ-MA's workforce on VZ-MA's facilities violates previous FCC rulings, including Cavalier Telephone, LLC v. Virginia Electric and Power Company.⁷⁵³

In this recently decided case, Virginia Electric Power Company prohibited the complainant (Cavalier Telephone) from using its own workforce on Virginia Electric Power Company's facilities.⁷⁵⁴ Virginia Electric Power Company argued that, while the FCC requires it to allow non-employees near its electric lines, the FCC does not require a utility to allow its own facilities to be worked on by non-employees or contractors.⁷⁵⁵ Cavalier Telephone argued that such a prohibition violated the FCC's guidelines, which state that utilities should allow non-

⁷⁵⁰ VZ-MA Application, Appdx. B, Vol. 45, Tab 565 at 5539 (Transcript of Oral Argument Held 09/08/00).

⁷⁵¹ Id. at 5535, 5567.

⁷⁵² Id. at 5567.

⁷⁵³ Cavalier Telephone, LLC v. Virginia Electric and Power Company, 15 FCC Rcd 40 (2000).

⁷⁵⁴ Id.

⁷⁵⁵ Id. at 9.

employees the ability to work on its facilities.⁷⁵⁶ After considering both positions, the FCC decided:

We have stated that a “utility may require that individuals who will work attaching or making ready attachments of telecommunications or cable system facilities to utility poles, in the proximity of electric lines, have the same qualifications, in terms of training, as the utility’s own workers, but the party seeking access will be able to use any individual workers who meet these criteria” [citations omitted]. While we agree that the use of multi-party contractors is an efficient means to accomplish make-ready work, and we encourage Respondent (Virginia Electric Power Company) to consider that alternative, we are not ready to order Respondent to proceed with that method. However, Respondent must make the effort to coordinate all make-ready work and specifically to perform any necessary work on its own facilities in a timely and cooperative manner. Respondent cannot use its own facilities to impede Complainant’s deployment of telecommunications facilities.⁷⁵⁷

In considering the Cavalier Telephone decision in light of VZ-MA’s make-ready procedures, the Department finds that VZ-MA’s procedures for the completion of make-ready work and issuance of pole attachment and conduit licenses agreements do not violate the FCC’s guidelines because VZ-MA’s make-ready policy does not impede, in any way, a CLECs’ ability to access poles and conduits. In fact, VZ-MA’s procedures call for the completion of make-ready work and issuance of licenses for pole attachments within 180 days and for conduit occupancy within 90 days after receiving authorization from the licensee.⁷⁵⁸ During the first

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Id.

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Id. at 9-10.

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VZ-MA Application, Appdx. B, Vol. 42, Tab 494 at ¶ 64 (VZ-MA May Checklist Aff.).

quarter of 2000, VZ-MA was able to complete make-ready work and issue licenses for pole attachments in an average of 130 days; consisting of 166 days for CLECS, 144 days for CATV, and 38 days for "other."⁷⁵⁹ The average number of days for make-ready work for conduit occupancy for the first quarter of 2000 was 90 days.⁷⁶⁰

Under VZ-MA's collective-bargaining agreement, VZ-MA must comply with certain personnel requirements for the performance of make-ready work. VZ-MA furnished copies of its labor contract to interested parties. CLECs have been able to use their workforce in performing work on CLEC-owned facilities.⁷⁶¹ The Department finds that VZ-MA's make-ready provision is reasonable because VZ-MA has an existing legal obligation under its labor agreement to utilize VZ-MA personnel, with some exceptions mentioned above, for the performance of duties on VZ-MA's plant and facilities. VZ-MA's obligations under its labor agreements also do not impede CLECs from utilizing their choice of workforce when performing work on CLEC-owned or controlled facilities.

AT&T alleged certain alleged systemic problems with respect to VZ-MA's procedures for CLEC access to underground conduits arguing that, under VZ-MA's procedures, conduit

⁷⁵⁹ Id.

⁷⁶⁰ Id.

⁷⁶¹ VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 45 (VZ-MA May Supplemental Comments).

access becomes unnecessarily difficult and expensive.⁷⁶² In examining AT&T's concerns, the Department finds that VZ-MA's conduit policy regarding both duct size and make-ready costs is reasonable because it provides a neutral policy for all CLECs, while not allowing any CLEC to secure more space than it requires. Moreover, we disagree with AT&T's claims of inflated charges, finding instead that VZ-MA collects charges for make-ready work only once and charges rent based on the amount of conduit space occupied by a CLEC.

Although AT&T comments that VZ-MA does not respond to a CLEC application within the requisite 45 days, the Department finds that VZ-MA's application process is appropriate. It is reasonable for the 45-day interval to begin after VZ-MA has had the opportunity to notify a CLEC about the process and associated costs.⁷⁶³ Moreover, the Department observes that VZ-MA has met the 45-day requirement approximately 95 percent of the time for 1999.⁷⁶⁴ During the first six months of 2000, VZ-MA met the 45-day requirement for 90 percent of the route-specific, pole attachment requests, and conduit and duct access not requiring project management. Additionally, in at least 90 percent of the cases in the second quarter 2000, VZ-MA satisfied CLEC requests for access to poles without the need for make ready work. In

⁷⁶² VZ-MA Application, Appdx. B, Vol. 38, Tab 460 at 54 (AT&T July Supplemental Comments).

⁷⁶³ This 45-day period does not include an initial seven-day period from receipt of an application to send the applicant a written statement for the estimated costs to perform the record search and survey to determine conduit availability. VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 42 (VZ-MA May Supplemental Comments.).

⁷⁶⁴ Id.

addition, VZ-MA has incorporated the 45 day requirement to complete field surveys and provide a response to CLECs' applications into its revised aerial and conduit licensing agreements.⁷⁶⁵ All of these actions lead to the conclusion that VZ-MA fulfills its obligation to respond in a timely manner to CLECs' applications for pole, conduit and duct access.

Addressing AT&T's concern that VZ-MA reserves conduit space for itself,⁷⁶⁶ the Department is satisfied that VZ-MA's policy of reserving space (i.e., VZ-MA will only set-aside space for up to one year if documented by a fully engineered plan)⁷⁶⁷ is not discriminatory. Nothing precludes a CLEC from beginning pre-construction work in advance of receiving its occupancy license from VZ-MA.⁷⁶⁸ Should pre-construction work for a CLEC take nine months to complete, the CLEC has the same time period to reserve space as VZ-MA. Therefore, because VZ-MA's conduit space procedure protects VZ-MA and CLECs from being unable to use available structures for long periods of time and because VZ-MA and CLECs are treated in the same manner, the Department finds that VZ-MA's reservation of conduit space is neither unreasonable nor discriminatory. Accordingly, the Department finds that VZ-MA's

⁷⁶⁵ VZ-MA Application, Appdx. B, Vol. 46, Tab 546 (VZ-MA's Response to DTE Record Requests 318 and 319).

⁷⁶⁶ VZ-MA Application, Appdx. B, Vol. 38, Tab 460 at 21 (AT&T July Supplemental Comments).

⁷⁶⁷ VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 43 (VZ-MA May Supplemental Comments).

⁷⁶⁸ Id. at 44.

amended procedures for access to conduit contained in its new master underground licensing agreements are consistent with the Act, do not pose an unnecessary restriction on licensees, and are designed to ensure continued access (by both VZ-MA and CLECs) to existing conduit facilities.

With respect to RCN's position that VZ-MA engages in the practice of boxing poles in Quincy but prevented RCN from doing the same,⁷⁶⁹ we note that VZ-MA has admitted that VZ-MA-owned poles were previously boxed in Quincy, this is no longer the practice.⁷⁷⁰ VZ-MA also states that boxing of VZ-MA's poles does not occur at new facilities because of VZ-MA's concern for its own facilities and the facilities of other attachers on the pole.⁷⁷¹ Therefore, the Department finds that VZ-MA's prohibition on boxing is not an unnecessary restriction on licensees because the policy is designed to protect existing facilities on poles and because VZ-MA's policy does not unduly affect any particular licensee or unfairly advantage VZ-MA. In addition, we find that VZ-MA's boxing policy is nondiscriminatory because VZ-MA no longer boxes for itself.

With respect to RCN's comments that VZ-MA only allows 2,000 poles at a time in any one district, RCN admits that VZ-MA has modified this policy so that the 2,000 limit is not

⁷⁶⁹ VZ-MA Application, Appdx. B, Vol. 42, Tab 494 at ¶ 70 (VZ-MA August Supplemental Checklist Aff.).

⁷⁷⁰ Id.

⁷⁷¹ Id.

absolute.⁷⁷² VZ-MA's pole attachment agreement limiting the application to no more than 2,000 poles in any one application, prevents a single CLEC from using all of VZ-MA's resources for one request, thereby crowding out other requesters.⁷⁷³ We find that VZ-MA's application policy serves a useful purpose for CLECs. Specifically, by segmenting a large application for access to poles, CLECs are able to install cable before VZ-MA has completed all the necessary make-ready work that may be required on an extremely large application. CLECs, therefore, are able to access poles in an expedited manner. Accordingly, we find no discriminatory result in VZ-MA's policy on the number of poles accessed at any one time.

In addressing the reasonableness of VZ-MA's make-ready work estimates, we note that VZ-MA's make-ready costs are accurately broken down into specific categories and thus the make-ready costs are sufficiently explained to the licensee. Moreover, the Department notes that VZ-MA has charged the same pole attachment rates for over 20 years.⁷⁷⁴ Moreover, if a licensee believes that a pole attachment rate is unreasonable, the Department has complaint procedures wherein a licensee may file an action alleging unreasonable pole attachment rates.⁷⁷⁵

VZ-MA has modified its overlash procedures to ensure that costs for post-construction

⁷⁷² VZ-MA Application, Appdx. B, Vol. 49, Tab 565 at 5568 (Transcript of Oral Argument Held on 09/08/00).

⁷⁷³ VZ-MA Application, Appdx. B, Vol. 32a-b, Tab 423 at 47 (VZ-MA May Supplemental Comments).

⁷⁷⁴ Id. at 51.

⁷⁷⁵ See 220 C.M.R. §§ 45.00 et seq.

inspections are the responsibility of licensees only when an inspection finds the pole attachments to be in non-compliance. VZ-MA's overlash procedures have eliminated the sampling provisions for post-construction inspection.⁷⁷⁶ While VZ-MA has the right to inspect overlash projects, the licensee is not required to pay for the inspection of poles found in compliance. Therefore, the Department finds VZ-MA's revised overlash procedures to be reasonable.

In response to NECTA's allegation that VZ-MA overlashes to its own facilities without providing notice and complying with the overlash procedures,⁷⁷⁷ the Department notes that VZ-MA does not license itself and, therefore, the licensing procedures logically would not apply to VZ-MA. Insisting that they be so applied would be an idle and formalistic exercise and nothing more. Further, the Act's parity requirement does not demand that VZ-MA establish the same overlashing process for itself that it does for other licensees. The Department is satisfied that VZ-MA has designed sufficient safeguard procedures in order for licensees, including CLECs, to access poles, ducts, conduits and rights-of-ways in a fair manner.

Based on the evidence in the record, the Department finds that VZ-MA has conclusively demonstrated that it is providing nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates, terms, and conditions in accordance with the requirements of § 224, and has satisfied the requirements of checklist item 3. While some

⁷⁷⁶ VZ-MA Application, Appdx. B, Vol. 46, Tab 544 (Verizon-MA's Response to DTE Record Requests 318 and 319).

⁷⁷⁷ VZ-MA Application, Vol. 49, Tab 565 at 5539 (Transcript of Oral Argument Held 09/08/00).

commenters raise allegations challenging VZ-MA's compliance with this checklist item, the record is not sufficient to support any contention that VZ-MA denied access to any pole, duct, conduit, or right-of-way in a discriminatory manner or imposed a rate, term or condition that was unreasonable. However, we note that our rules permit any party to raise claims of discriminatory treatment. The Department's finding with respect to checklist item 3 shall in no way be considered precedential in any proceeding under these rules. The Department's conclusion here is in the context of checklist compliance only.

D. Checklist Item 4 - Unbundled Local Loops

1. Standard of Review

Section 271(c)(2)(B)(iv) requires a BOC to provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." In various orders, the FCC has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an ILEC central office, and the demarcation point at the customer's premises.⁷⁷⁸ Moreover, this definition includes two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals.⁷⁷⁹

To meet the standard set forth in this checklist item, VZ-MA must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in

⁷⁷⁸ SBC Texas Order at ¶ 246 (citations omitted).

⁷⁷⁹ Id.; see also Bell Atlantic New York Order at ¶ 268.